95-1717

No.

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

DAVID W. LANIER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DREW S. DAYS, III
Solicitor General
DEVAL L. PATRICK
Assistant Attorney General
PAUL BENDER
Deputy Solicitor General
PAUL R.Q. WOLFSON
Assistant to the Solicitor General
JESSICA DUNSAY SILVER
THOMAS E. CHANDLER
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether, under *Screws* v. *United States*, 325 U.S. 91 (1945), a defendant may not be convicted under 18 U.S.C. 242 for the willful violation of a right secured by the Due Process Clause of the Fourteenth Amendment unless that right has previously been made specific by a decision of this Court in factually similar circumstances.

2. Whether, for purposes of 18 U.S.C. 242, the right secured by the Due Process Clause of the Fourteenth Amendment to be free from interference with bodily integrity by a sexual assault by a state official acting under color of law has been "made specific," within the meaning of *Screws* v. *United States*, 325 U.S. 91 (1945).

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The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The panel opinion of the court of appeals (App. 87a-143a)[1] is reported at 33 F.3d 639. The order of the court of appeals vacating the panel opinion and granting rehearing en banc (App. 165a-166a) is reported at 43 F.3d 1033. The en banc opinion of the court of

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[1] "App." refers to the separately bound appendix to this petition, and "C.A. App." refers to the joint appendix filed in the court of appeals.

appeals (App. 1a-86a) is reported at 73 F.3d 1380. The order of the district court denying respondent's motion to dismiss the indictment (App. 144a-156a) is unreported.

JURISDICTION

The judgment of the en banc court of appeals was entered on January 23, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Section 1 of the Fourteenth Amendment to the United States Constitution provides, in relevant part, that "[n]o State shall * * * deprive any person of life, liberty, or property, without due process of law."

2. Section 242 of Title 18, United States Code, provides in pertinent part as follows:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State * * * to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States * * * shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section[,] * * * shall be fined under this title or imprisoned not more than ten years, or both[.][2]

[2] When respondent was indicted in this case, prior to the 1994 amendments to Section 242, the statute referred to "any inhabitant of" any State, rather than "any person in" any State. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320201(b), 108 Stat. 2113.

STATEMENT

After a jury trial in the United States District Court for the Western District of Tennessee, respondent was convicted on seven counts (two felony counts and five misdemeanor counts) of willfully depriving a person of rights and privileges protected and secured by the Constitution and laws of the United States, in violation of 18 U.S.C. 242. He was acquitted on four counts charging violations of Section 242. He was sentenced to ten years' imprisonment on each felony count and one year's imprisonment on each misdemeanor count, to be served consecutively, for a total of 25 years' imprisonment, all to be followed by two years' supervised release. He was also fined $25,000 and ordered to pay the costs of his incarceration. A panel of the court of appeals affirmed the convictions and sentence. On rehearing, the en banc court reversed all the convictions.

1. Between 1989 and 1991, while he was an elected Chancery Court judge for Dyer and Lake Counties, Tennessee, respondent David Lanier sexually assaulted five women in his chambers, during the working day. In each instance, the victim was in respondent's chambers incident to her employment with the court system or to the prospect of such employment; one of the victims also had a child custody matter before respondent. Respondent committed one of the assaults while wearing his judicial robe.

Respondent was the only chancellor and juvenile court judge in the two counties, and all the employees of the two courts held their positions at his pleasure. App. 89a. He is a member of a politically prominent family in the area, and at the relevant times his brother was the local prosecutor. App. 34a, 63a.

a. The two felony counts on which respondent was convicted involved two incidents of forcible oral rape of Vivian Archie. In 1989, respondent presided over Archie's divorce and awarded her custody of her daughter. During the following year, Archie applied for a job at the courthouse, and respondent interviewed her in his chambers. During the meeting, respondent told Archie that her father had recently told him that "she was not a good mother," and that her father "wanted custody of her child." App. 94a. Archie became afraid that respondent was going to take her daughter away from her. Respondent told Archie that he could not talk about the matter because he was the judge who would hear the case. *Ibid.*

Respondent then told Archie that he had promised the job to someone else. Archie responded that she would do anything to get a job, so that she could support her daughter. When she was preparing to leave respondent's chambers, she reached across the desk to shake respondent's hand. Respondent grabbed her hand, pulled her around the end of the desk, grabbed her hair and neck, and tried to fondle and kiss her. Although Archie tried to push him away, respondent threw her into a chair and continued to try to kiss her. He then stood over her, exposed himself, pulled her head down, and squeezed her jaws to make her open her mouth. He forced his penis into her mouth and repeatedly thrust it into her mouth until he ejaculated. Archie did not report the assault to anyone, including her family, because she was afraid that respondent would take custody of her child away from her. App. 94a-95a.

A few weeks later, respondent telephoned Archie's home and left a message that "he had a job for her,"

but that she would have to come by his chambers to get the information. At her mother's insistence, Archie called back. Although Archie repeatedly asked respondent to give her the location of the job interview over the telephone, respondent insisted that Archie return to his chambers for the information. Archie went to his chambers, fearing that, if she did not, respondent would conclude that she had told her parents about the assault and would retaliate. While she was in his chambers, respondent told her about a secretarial position with a friend of his. As they were talking, respondent walked around his desk towards her. She began backing out toward the door, but he slammed the door shut, pulled her hair, and pushed her into a chair. He then exposed himself, and again forced her to open her mouth and perform oral sex, and ejaculated in her mouth. During the assault, Archie was crying, gagging, choking, and having trouble breathing. App. 63a-64a.

As with the first assault, Archie did not report the second incident because she was afraid that respondent would retaliate by taking away her child. When she subsequently met respondent, he asked her "how her family life was going," a remark she interpreted as a threat to take away custody if she reported the assaults. App. 64a.

b. The five misdemeanors involve respondent's sexual assaults on four other women. In 1989, respondent sexually assaulted Sandra Sanders, whom he had hired to supervise the Youth Service Office of the Dyer County Juvenile Court. As part of her job, Sanders was required to attend weekly meetings with respondent in his chambers. During one of those meetings, respondent grabbed and squeezed her breasts. Sanders did not report the incident because

she thought no one would believe her, but she confronted respondent and demanded an apology. Although he apologized, he began complaining about the quality of her work, and eventually he demoted her. App. 91a-92a.

Respondent sexually assaulted Patty Mahoney, his secretary, in his chambers. Respondent hired Mahoney in the fall of 1990; she was recently divorced and had two young children to support. Within a day after she began the job, respondent began to touch her breasts and buttocks. He then became more aggressive, grabbing and squeezing her breasts. Although she confronted him about his behavior, the grabbing and squeezing continued on a daily basis. One day, Mahoney broke down crying, and told respondent that she needed the job and wanted him to leave her alone. He reacted by putting his arms around her, picking her off the floor, and aggressively hugging her. He then slid her down his body and ground his pelvis against her. App. 93a. Mahoney quit the job after only two weeks because "it became clear to [her] that he was not going to leave [her] alone." Tr. 3-472. She did not report the incidents because "the Lanier family was so powerful, she thought that no one would hire her if she reported [his] behavior." App. 93a.

In March, 1991, respondent sexually assaulted another of his secretaries, Sandy Attaway. After her first month of work, respondent began to make sexual remarks to her. He asked Attaway if she were afraid of him; when she responded (falsely) that she was not, he told her that "he was a judge, and everyone should be afraid of him." App. 99a. One day, while wearing his judicial robe in his chambers, he walked behind Attaway, put his arms around her, and "pushed his pelvic area into [her] rear end and began grinding into

[her]" with his erect penis. Tr. 2-224; see App. 99a. Attaway did not quit because she needed the job, but three months later, respondent fired her anyway. He subsequently told her that "they would have gotten along fine if she had liked to have oral sex." *Ibid.*

In the fall of 1991, respondent sexually assaulted Fonda Bandy during a meeting in his chambers concerning her work in implementing parenting classes for parents who lived in public housing and who had children in juvenile court (over which respondent presided). After Bandy made a presentation in his chambers, Lanier put his arms around her, kissed her, firmly pulled her up to him, and fondled her breasts. When she tried to escape, he reached out and put his hand on her crotch. Respondent told Bandy that, if she came back to see him, she would have all the clients she needed. App. 99a-100a.

2. Respondent was indicted on 11 counts of violating 18 U.S.C. 242. The indictment alleged in each count that respondent had willfully subjected his victim "to the deprivation of rights and privileges which are secured and protected by the Constitution, and the laws of the United States, namely, the right not to be deprived of liberty without due process of law, including the right to be free from wil[l]ful[] sexual assault." C.A. App. 25-33.

The trial court explained to the jury that respondent was charged in each count with depriving someone of the right "not to be deprived of liberty without due process of law, specifically [the] right to be free from willful sexual assault." C.A. App. 884. It explained that, included in the rights secured by the Fourteenth Amendment "is the concept of personal bodily integrity and the right to be free of unauthorized and unlawful physical abuse by state

intrusion." *Ibid.* It instructed that the Due Process Clause protects against physical abuse when the conduct "is so demeaning and harmful under all the circumstances as to shock one's consci[ence]." *Ibid.* And it charged the jury that not "every unjustified touching or grabbing by a state official * * * constitutes a violation of a person's constitutional rights. The physical abuse must be of a serious and substantial nature that involves physical force, mental coercion, bodily injury or emotional damage which is shocking to one's consci[ence]." *Id.* at 884-885. Petitioner did not object to those instructions. See Tr. 10-1742 to 10-1752.[3]

The jury returned verdicts of guilty on seven counts, and not guilty on three counts; the court

[3] Before trial, respondent moved to dismiss the indictment, arguing that Section 242 does not give fair notice of the conduct proscribed, and thus is unconstitutionally void for vagueness. That motion did not assert that respondent's alleged conduct did not violate a constitutional right. The trial court denied the motion, noting that this Court had upheld the statute against a vagueness challenge in *Screws* v. *United States*, 325 U.S. 91 (1945). See App. 145a-147a. The court also stated that, "[a]lthough the issue has not been raised, it is clear that existing law recognizes one's constitutional right to be free of coerced sexual acts such as intercourse or oral sex." App. 146a n.4. After the government rested its trial case, respondent moved for a judgment of acquittal on all counts, arguing, in part, that "no federal crime [had been] proved by the government." Tr. 6-960. That argument was based on the requirement of Section 242 that the action have occurred "under color of law." Respondent stated that, except as to Count 9, he was "not alleging that there has been no deprivation of constitutional rights shown. I am satisfied that a deprivation of freedom on [*sic*] liberty from sexual assault is adequate." Tr. 6-960; see also Tr. 6-991; App. 103a. The court denied the motion for acquittal. Tr. 6-1000.

dismissed one count.[4] With respect to the two counts involving the assaults on Vivian Archie, the jury found that Archie had suffered "bodily injury" from those assaults, which, under the text of Section 242, made respondent eligible for a maximum term of ten years' imprisonment on those counts. See App. 109a-111a. The court sentenced respondent to a ten-year prison term on each of those counts, and to the maximum one-year prison term available for each of the other counts, for a total term of 25 years' imprisonment. App. 159a.

3. a. A unanimous panel of the court of appeals affirmed the convictions and sentence, App. 87a-143a,[5]

[4] Respondent was found not guilty on Counts 1, 3, and 10, which alleged that he committed another sexual assault against Sandra Sanders, and also sexually assaulted two women not named in the text. C.A. App. 25-26, 32. The court dismissed Count 9, which alleged that respondent sexually assaulted a woman in his chambers, when she was meeting with him about her case, by exposing his genitals and urging her to engage in sexual acts with him. Tr. 10-1738; C.A. App. 31.

[5] Rejecting respondent's contention that he had not deprived his victims of a constitutional right, the panel concluded that "the government established that [respondent] violated the victims' constitutional right; namely, their right to bodily integrity. Further, the right to bodily integrity has been defined and made specific by court decision." App. 104a. "It is settled now," the panel continued, "that the Constitution places limits on a State's right to interfere with a person's . . . bodily integrity." *Ibid.* (quoting *Canedy* v. *Boardman*, 16 F.3d 183, 185 (7th Cir. 1994) (quoting *Planned Parenthood* v. *Casey*, 505 U.S. 833, 849 (1992))). The panel also rejected respondent's contentions that he had not acted intentionally to deprive his victims of their constitutional rights, and that he had not acted under color of law. App. 106a-109a. With respect to the latter point, the panel noted that "all of the assaults took place in [respondent's] chambers during working hours, * * * during

but on rehearing, a divided en banc court reversed and instructed the district court to dismiss the indictment, App. 1a-86a. The majority opinion (App. 1a-32a) initially framed the question as whether "the sexual harassment and assault of state judicial employees and litigants by the judge violates" Section 242. App. 3a. The majority noted that Section 242 "does not specifically mention or contemplate sex crimes," *ibid.*, and "by its terms criminalizes violations of 'constitutional rights' only in the abstract, not conduct which is specifically described by federal or state statute," App. 4a. It noted "the fundamental principle limiting the judicial power to extend criminal statutes by interpretation," *ibid.*, since, "[n]o matter how outrageous a defendant's actions may be, he has to be charged with the appropriate offense created by criminal law," App. 5a.

After reviewing the legislative history of Section 242,[6] the majority concluded that sexual assault by a state actor is not punishable under that Section as a

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each assault there was at least an aura of official authority and power, [and] * * * there was evidence that [respondent] used his position to intimidate his victims into silence." App. 108a.

[6] The opinion concluded that "Congress never deliberately intended to criminalize in § 242 the greatly expanded scope of modern-day constitutional rights even though the literal language of the statute—recodified from a previous civil statute by mistake—is open to that interpretation." App. 16a. Only seven of the court's fifteen judges (fewer than a majority) joined that part of the opinion. Its significance is in any event unclear, since the opinion acknowledged elsewhere that, once this Court has specifically recognized a constitutional right protected by the Due Process Clause, violations of that right may be punished under Section 242. App. 28a-29a. See *United States* v. *Guest*, 383 U.S. 745, 753 (1966); *United States* v. *Price*, 383 U.S. 787, 798, 800 (1966).

violation of rights protected by the Due Process Clause. It rejected the government's argument that, for purposes of Section 242, freedom from sexual assault by a state officer is part of an established "constitutional right against interference with 'bodily integrity' in a way that 'shocks the conscience.'" App. 17a.[7] "Conditioning the right on whether the particular acts of a defendant 'shock the conscience' leaves the definition of the crime up in the air, * * * [and] requires [jurors] to make an essentially arbitrary judgment. * * * 'Shocks the conscience' is too indefinite to give notice of a crime" and "will yield results that depend too heavily on factual particularity of an individual set of events and upon biases and opinions of individual jurors." App. 19a-20a.[8]

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[7] The government had relied, for that proposition, on *Ingraham* v. *Wright*, 430 U.S. 651 (1977), lower-court decisions in civil cases decided under 42 U.S.C. 1983, and previous appellate decisions involving prosecutions under Section 242 for the deprivation of constitutional rights through sexual assault. See Gov't En Banc C.A. Br. 7-10. The majority found no support for the government's argument in those decisions, or in *Rochin* v. *California*, 342 U.S. 165 (1952). See App. 17a-18a.

[8] The court also found support in canons of interpretation of criminal statutes. App. 20a-25a. It emphasized that the legislature (not the judiciary) is the primary lawmaking body, that the rule of lenity requires that ambiguous criminal statutes be construed in favor of the defendant, and that criminal statutes must be strictly construed. App. 21a. "A holding here that [respondent] is criminally liable under federal law" was impermissible, the court stated, because "no language of the statute and no holding of the Supreme Court suggest that [his] behavior constitutes a federal constitutional crime. There has been no notice to the public of such a federal crime. To hold otherwise would violate the Rule of Law." App. 25a.

The court then addressed *Screws* v. *United States*, 325 U.S. 91 (1945), in which this Court rejected a challenge to Section 242 as void for vagueness. In *Screws*, a plurality of the Court stated that a defendant can know with sufficient definiteness "the range of rights that are constitutional" and therefore protected from violation by Section 242, because it construed Section 242 to require a specific intent to deprive a person of a right that has been "made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them." 325 U.S. at 104.

Based on that language in *Screws*, the majority concluded that "the right not to be assaulted" does not meet the standard of specificity required by *Screws* because "it is not publicly known or understood that this right rises to the level of a 'constitutional right.' It has not been declared as such by the Supreme Court. It is not a right listed in the Constitution, nor is it a well-established right of procedural due process like the right to be tried before being punished." App. 28a.

Although the government argued that the right under the Due Process Clause to be free from sexual assault, and indeed from unjustified brutal official assault generally, was well established by lower-court decisions (see Gov't En Banc C.A. Br. 7-10), the court held that such lower-court decisions are insufficient to provide the notice necessary to support conviction under Section 242:

> Only a decision of the Supreme Court establishing the constitutional crime under § 242 can provide such notice. To accept lower court authority would result routinely in making federal criminal liability under § 242 turn on new crimes recognized only by the circuit or district court where the defendant engaged in the conduct at issue. * * * Only a Supreme Court decision with nationwide application can make specific a right that can result in § 242 liability.

App. 28a-29a.

The majority also read *Screws* to hold that this Court "must not only enunciate the existence of a right, it must also hold that the right applies to a factual situation fundamentally similar to the one at bar"; thus, "[i]f the [Supreme] Court enunciates a right, but leaves some doubt or ambiguity as to whether that right will apply to a particular factual situation, the right has not been 'made specific' as is required under *Screws*." App. 29a-30a. It also remarked that "[t]he 'make specific' standard is substantially higher than the 'clearly established' standard used to judge qualified immunity in section 1983 civil cases." App. 30a. Applying that strict standard, it concluded that "sexual assaults may not be prosecuted as violations of a constitutional substantive due process right to bodily integrity," App. 31a, and it ordered dismissal of the indictment, App. 32a.

b. Judges Wellford and Nelson wrote separate opinions concurring in part and dissenting in part. Both concluded that the conduct underlying the misdemeanor counts did not reach the level of a constitutional violation, but both also concluded that the forcible oral rapes of Vivian Archie did reach that level, and that the rapes could be punished under

Section 242 as violations of a constitutional right that had been made specific. App. 33a-41a, 42a-46a.[9]

c. Judge Daughtrey wrote the principal dissenting opinion. App. 57a-86a.[10] She disagreed with the

[9] Judge Wellford stated that, "[o]nce a due process right has been defined and made specific by court decisions, that right is encompassed by § 242." App. 37a. He stressed that "the Supreme Court has recognized that persons, especially females, have a constitutional right to bodily integrity." App. 38a (citing *Planned Parenthood* v. *Casey*, 505 U.S. 833 (1992), and *Ingraham* v. *Wright*, 430 U.S. 651 (1977)). He also noted that lower courts had recognized a right to be free "from physical and sexual assault" in previous civil and criminal cases. App. 38a-39a.

Judge Nelson found the applicability of the statute to be "self-evident," App. 43a, since Vivian Archie was "literally (and humiliatingly) deprived of her liberty while locked in [respondent's] foul embraces. * * * [She] was restrained not only by [respondent's] hands on her throat, but by [his] none-too-subtle suggestion that her daughter would be taken away from her if she resisted," App. 44a. Even though the Supreme Court has not decided explicitly "whether Section 242 criminalizes a deprivation of liberty resulting from lust," he noted that it would be "passing strange" if "judges could acquire by prescription a right to make sex slaves of litigants or prospective litigants." He also remarked that he was "not sure how such a question would ever reach the Supreme Court in the first place." App. 45a.

[10] Judge Daughtrey's dissent was joined in full by Judges Keith and Moore. Judge Keith also wrote a separate dissent (App. 47a-49a), stating that respondent's actions were "more than enough to satisfy the most stringent interpretations for prosecution under § 242" (App. 47a). Judge Jones also dissented (App. 50a-57a) and stated that "court decisions have made specific the right to be free from invasions of bodily integrity that shock the conscience" (App. 51a). Even though this Court "has not held specifically that sexual assault violates the right to bodily integrity," he observed that "a number of

majority's reading of *Screws* as requiring Supreme Court decisions involving similar facts to support a conviction under Section 242. She noted that, in discussing the problem of notice to the defendant, *Screws* adverted to the need for "*decisions* interpreting [the Constitution]," not only "*Supreme Court decisions* providing such interpretations," and that *Screws* referred to "the decisions of *the courts*" as a "source of reference for ascertaining the specific content of the scope of due process." App. 73a-74a. She also stressed that problems of notice to the defendant are absent here, because, even if the Supreme Court had not delivered a decision directly on point, "all federal courts addressing analogous situations have accepted the long-standing existence and viability of a right to freedom from interference with bodily integrity." App. 74a.

"Even more troubling," Judge Daughtrey remarked, was that the majority had "reject[ed] or ignore[d]" Supreme Court decisions recognizing "a constitutional right to bodily integrity." App. 74a (citing *Planned Parenthood* v. *Casey*, 505 U.S. 833 (1992), *Cruzan* v. *Missouri Dep't of Health*, 497 U.S. 261 (1990), *Youngberg* v. *Romeo*, 457 U.S. 307 (1982), and *Ingraham* v. *Wright*, 430 U.S. 651 (1977)). Although those decisions "do not specifically mention

ways exist to deprive one of [that] right," and noted that violations of that right have previously been the subject of convictions under Section 242, as well as civil litigation. App. 52a. Such "specific establishment of rights" by the courts, he stated, was sufficient to prevent any danger "that runaway * * * prosecutors will break open the bounds of the statute[.] * * * Only after [a judicial] decision has been made are prosecutors afforded the opportunity to bring indictments." App. 55a.

sexual assaults upon individuals under color of law, * * * logical interpretations of existing law cannot be ignored by the courts simply because *factually* similar cases are not present[]." App. 74a-75a. Indeed, Judge Daughtrey noted:

> The easiest cases don't even arise. There has never been [, for example,] a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages liability because no previous case had found liability in such circumstances.

Ibid. (citation omitted). "Likewise," she concluded, "this is the 'easy' case that demonstrates a blatant violation of those Supreme Court and courts of appeals precedents that have 'made specific' the fact that interference with personal security and bodily integrity that shocks the conscience is proscribed by the substantive due process principles of the Fourteenth Amendment." *Ibid.*

REASONS FOR GRANTING THE PETITION

For decades, Section 242 of Title 18, United States Code, has been the primary tool for bringing to justice state officials who engage in the most egregious abuses of official power, including rapes, beatings, and other unjustified assaults. The court of appeals' decision will sharply, erroneously, and arbitrarily limit such prosecutions. Review by this Court is necessary to ensure that Section 242 will be able to continue to play its central role in the protection of fundamental constitutional rights against clear official abuse.

In *Screws* v. *United States*, 325 U.S. 91 (1945), the Court addressed concerns arising from the broad language of Section 242, which does not list the constitutional rights that it protects. In rejecting a vagueness challenge to the provision, the Court held that the statute's element of willfulness requires the government to prove that the defendant had the intent to deprive a person of a right "made specific" by either the express terms of the Constitution or "decisions of the courts" interpreting the Constitution. That standard has not been a difficult one to apply in practice.[11]

The court of appeals has arbitrarily held, however, that a due process right can be "made specific" within the meaning of *Screws* (and thus a deprivation of that right can be punished under Section 242) only if the right has been enunciated in a decision of *this Court* in a *factually similar case.* That decision is contrary to decisions in other circuits, and is not compelled by the reasoning or language of the *Screws* opinion. It also presents a serious practical threat to federal

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[11] Approximately 30 cases per year are prosecuted by the Department of Justice under Section 242. Most involve brutal assaults by persons acting under color of law, and many are necessarily based on the Due Process Clause right to bodily integrity, since they arise out of situations where the Fourth and Eighth Amendments do not apply, such as beatings of pretrial detainees. Since 1981, the Civil Rights Division of the Department of Justice has prosecuted at least 29 cases under Section 242 involving sexual assault by public officials; more than half of those cases were brought in the last five years. Typically, the victim in those cases has been a woman who was sexually assaulted by a jailor, police officer, or border patrol agent. Three cases, other than this case, involved sexual assault by state judges; two resulted in guilty pleas, the third in acquittal.

prosecution of civil rights offenses, particularly in cases involving the most egregious abuses of authority, such as rape and other brutal assaults—abuses which, because the deprivation of rights is so clear, ordinarily do not reach this Court.

The court of appeals' erroneous reading of *Screws* led to its conclusion that Section 242 may not be used to punish the deprivation of rights that occurred in this case. A long series of decisions by this Court, and also lower-court decisions, have "made specific," within the meaning of *Screws*, that the Due Process Clause protects a fundamental right to be free from rape and brutal assault by a state officer, using his or her office to commit the crime. Respondent may be punished under Section 242 for violating that right.

1. a. The court of appeals erred in reading *Screws* to hold that the violation of a right protected by the Due Process Clause may not be punished under Section 242 unless that right has been recognized by this Court in a factually similar situation. In *Screws*, the Court explicitly addressed the concern expressed by the court of appeals in this case—that, given the "broad and fluid" definition of due process, a state official could be prosecuted for violating a right that he or she could not have known existed. See 325 U.S. at 95-97. The Court rejected the argument that Section 242 is unconstitutionally vague as applied to due process rights, after holding that the statute's element of willfulness requires proof of intent "to deprive a person of a right which has been made specific either by the express terms of the Constitution or laws of the United States or decisions interpreting

them." *Id.* at 104.[12] Under that construction of Section 242, "the claim that [Section 242] lacks an ascertainable standard of guilt must fail," because the articulation of a constitutional right by the courts gives "fair warning" that an intentional deprivation of that right may be punished. *Id.* at 103-104.

The Court in *Screws* recognized that "*the decisions of the courts* are * * * a source of reference for ascertaining the specific content of the concept of due process." 325 U.S. at 96 (emphasis added). Moreover, the element of willfulness in Section 242 further ensures that "the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits." *Id.* at 102. Thus, the problem of notice is absent because Section 242 requires "a specific intent to deprive a person of a federal right made definite *by decision or other rule of law.*" *Id.* at 103 (emphasis added). And once the due process right has been "made definite by decision," the defendant is "in no position to say that [he] had no adequate advance notice that [his actions] would be visited with punishment." *Id.* at 105.

Screws refers to "decisions"; it does not forbid prosecution for a violation of a right protected by the Due Process Clause because a factually similar decision of this Court has not declared that right. Other circuits have recognized that a decision of this Court directly on point is not required by *Screws*. In several cases, they have looked to previous decisions of the courts of appeals, and sometimes also to de-

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[12] Although only four Justices joined the plurality opinion in *Screws*, that opinion has been taken in later cases as the decision of the Court. See *United States* v. *Guest*, 383 U.S. 745, 753-754 (1966); *United States* v. *Price*, 383 U.S. 787, 793 (1966).

cisions of this Court articulating the same broad constitutional right (but not necessarily on closely similar facts) to conclude that an offense could be punished under Section 242.

For example, in *Lynch* v. *United States*, 189 F.2d 476, cert. denied, 342 U.S. 831 (1951), the Fifth Circuit concluded that the defendant law enforcement officers could be convicted under Section 242 for "hand[ing] over" blacks who had been arrested to members of the Ku Klux Klan, who then beat the arrested men severely. *Id.* at 478. The court relied on *Screws* (which did not involve "handing over" arrested men to a private mob but, rather, a murderous assault by law enforcement officers themselves), on previous decisions of this Court indicating that "official inaction may also constitute a denial of equal protection," and also on a Fourth Circuit case involving failure to protect victims from group violence. It concluded from those sources that, under Section 242, the defendants could be punished for violating the victims' right to due process, and also equal protection, including "the right of protection due the prisoner by the arresting officers against injury by third persons." *Id.* at 479-480.

Similarly, in *United States* v. *Stokes*, 506 F.2d 771 (5th Cir. 1975), which involved a prosecution of a police officer for severely beating a man in custody at the police station, the court looked solely to decisions of courts of appeals for "the proposition that one's right to be free from unlawful assault by state law enforcement officers when lawfully in their custody has been made a definite and specific part of the body of due process rights." *Id.* at 775. See also *id.* at 775-776 (relying only on appellate cases under Section 1983 to conclude that due process includes "a right

not to be treated with * * * unprovoked force by those charged by the state with the duty of keeping accused and convicted offenders in custody").

United States v. *Dise*, 763 F.2d 586, cert. denied, 474 U.S. 982 (1985), was a prosecution against an employee of an institution for the mentally disabled for beating inmates with no authorized reason. There, the Third Circuit rejected the defendant's argument that he could not be convicted under Section 242 because the incidents took place before *Youngberg* v. *Romeo*, 457 U.S. 307 (1982), where this Court considered "for the first time the substantive rights of involuntarily committed mentally retarded persons under the Fourteenth Amendment," *id.* at 314. The court in *Dise* noted that the case involved the federally protected interest in "personal security and freedom from bodily restraint, [which] have always been protected by the due process clause." 763 F.2d at 588. Other courts have also looked to lower-court decisions as well as decisions of this Court to determine whether a right had been made sufficiently definite under *Screws*. See *United States* v. *Reese*, 2 F.3d 870, 888-889 (9th Cir. 1993), cert. denied, 114 S. Ct. 928 (1994); *United States* v. *Langer*, 958 F.2d 522, 524 (2d Cir. 1992); *United States* v. *Hayes*, 589 F.2d 811, 820 (5th Cir.), cert. denied, 444 U.S. 847 (1979).

b. Neither logic nor the reasoning of *Screws* supports the court of appeals' decision. A Supreme Court decision directly on point is not necessary for a conviction under Section 242. The willful violation of a constitutional right may be punished under Section 242 if the lower courts, following principles established by this Court, have recognized that the right is "so rooted in the traditions and conscience of our people as to be ranked as fundamental" (*Screws*, 325

U.S. at 95). It may also be punished if this Court has articulated the content of a fundamental constitutional right in a manner that shows its applicability to the case at hand, even if it has not applied that right in a closely similar fact pattern.

A principal concern of *Screws* is notice to the defendant. The Court there was concerned that Section 242 might be interpreted so that "a local law enforcement officer * * * can be sent to the penitentiary if he does an act which some court later holds deprives a person of due process of law." 325 U.S. at 97. Without a limiting construction of Section 242, "[t]hose who enforce local law today might not know for many months (and meanwhile could not find out) whether what they did deprived someone of due process of law." *Ibid.*

A prior decision of this Court articulating a constitutional right in closely similar factual circumstances is not necessary to ensure adequate notice to defendants under Section 242. When lower-court decisions or the "traditions and conscience of our people" clearly show the existence of a fundamental right, a violation of that right by an official acting under color of law may be punished under Section 242. In such circumstances, the defendant is not forced to guess at the actions that the statute makes criminal, and "he hardly may be heard to say that he knew not what he did." 325 U.S. at 105. This case well illustrates this point; although there is no Supreme Court decision directly on point, forcible rape or sexual assault by a state official, using the authority of his office to coerce his victims, clearly deprives those victims of liberty without due process, as those concepts have been universally interpreted. The same would be true of a brutal beating of a pretrial

detainee by prison guards, or the wanton brutalization of children by a juvenile court judge.

A rule that only a specific decision of this Court can form the basis of a due process right protected from deprivation by Section 242 would lead to perverse results, and would severely impair federal protection of civil rights—especially protection from brutal assaults or rapes by state officials in situations where neither the Fourth Amendment nor the Eighth Amendment would apply. It would lead, for example, to the odd result that a prison guard could be convicted under Section 242 for raping a convicted felon, but not for raping a pretrial detainee, who is not protected by the Eighth Amendment.[13] Under the court of appeals' arbitrary rule, even if every federal court of appeals had recognized, in civil cases, a right under the Due Process Clause to be free from such rapes, that right nevertheless would not have been "made specific" by "decisions of the courts" within the meaning of *Screws*, because of the absence of a Supreme Court decision. But if the lower courts were unanimous in finding a due process violation, review by this Court would be both unnecessary and unlikely. Thus, the most outrageous abuses of authority by state actors would be placed outside the

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[13] Before *Graham* v. *Connor*, 490 U.S. 386 (1989), all incidents of excessive force by state officials were prosecuted under Section 242 as violations of the Due Process Clause. *Graham* makes clear that excessive force cases involving Fourth Amendment "seizures" must be analyzed under that Amendment's reasonableness standard, and not under a substantive due process approach. Similarly, cases involving excessive force inflicted on convicted prisoners are now prosecuted as violations of the Eighth Amendment. See *Hudson* v. *McMillian*, 503 U.S. 1 (1992).

reach of Section 242; the federal government could take no action to vindicate the civil rights of those who had suffered the worst depredations, precisely because there was broad consensus that the rights were constitutionally protected. As Judge Nelson pointed out below (App. 45a), it would be "passing strange" if state actors could acquire in that fashion a privilege to deprive persons of their constitutional rights.

2. This Court has clearly recognized, in a variety of contexts, a due process liberty interest to be free from forcible, unjustified intrusions on personal bodily integrity. Over a century ago the Court emphasized that "[n]o right is held more sacred, or is more carefully guarded by common law, than the right of every individual to the possession and control of his own person, free from all restraint and interference of others, unless by clear and unquestionable authority of law." *Union Pacific Ry.* v. *Botsford*, 141 U.S. 250, 251 (1891). In *Rochin* v. *California*, 342 U.S. 165 (1952), the Court held that due process was violated by the forcible administration of a "stomach pumping" solution to recover evidence swallowed by an arrestee, and stressed the "general requirement" that "States in their prosecutions respect certain decencies of civilized conduct," *id.* at 173, and avoid "force so brutal and so offensive to human dignity," *id.* at 174. More recently, the Court has made clear that "[a]mong the historic liberties" protected by the Due Process Clause is "a right to be free from * * * unjustified intrusions on personal security." *Ingraham* v. *Wright*, 430 U.S. 651, 673 (1977). And in *Youngberg* v. *Romeo*, 457 U.S. 307, 315-316, 324 (1982), the Court reiterated that bodily integrity is protected

as a matter of substantive liberty under the Due Process Clause.

In a closely related context, the Court has made clear that all persons have a liberty interest protected by due process in avoiding "unwanted administration" of medical procedures. See *Washington* v. *Harper*, 494 U.S. 210, 221-222 (1990); *Cruzan* v. *Director, Missouri Dep't of Health*, 497 U.S. 261, 278 (1990). Justice O'Connor, concurring in *Cruzan*, observed that "state incursions into the body [are] repugnant to the interests protected by the Due Process Clause." *Id.* at 287. Justice Stevens, dissenting, similarly emphasized that the "sanctity, and individual privacy, of the human body is obviously fundamental to liberty." *Id.* at 342. And in *Planned Parenthood* v. *Casey*, 505 U.S. 833 (1992), the Court again stressed that the Due Process Clause limits the State's right to interfere with bodily integrity. See *id.* at 869 (joint opinion) (stressing "the urgent claims of the woman to retain the ultimate control over her * * * body, claims implicit in the meaning of liberty"). Thus, "[s]hort of attempting to catalogue every possible factual situation involving an intrusion upon personal security or bodily integrity, it is impossible to see how the * * * Court could have more explicitly stated over the years that violations of that precious right cannot be tolerated in a free and civilized society." App. 76a (Daughtrey, J., dissenting).

Following those decisions from this Court, courts of appeals have squarely held that the fundamental due process right to bodily integrity includes the right to be free from rape, sexual assault, and other brutal assaults committed without a legitimate purpose; they have also held that this right was well

established by the time of the incidents in this case. The Fifth Circuit, in *Doe* v. *Taylor Independent School District*, 15 F.3d 443 (en banc), cert. denied, 115 S. Ct. 70 (1994), held that a teacher's sexual abuse of a student violated the student's due process right to bodily integrity, and stated that it was "crystal clear" that "[n]o reasonable public school official in 1987 would have assumed that he could, with constitutional immunity, sexually molest a minor student." *Id.* at 455.[14] Similarly, the Third Circuit, in *Stoneking* v. *Bradford Area School District*, 882 F.2d 720 (1989), cert. denied, 493 U.S. 1044 (1990), held that the due process right to be free from sexual assault was clearly established; citing *Ingraham* v. *Wright*, *supra*, the court stated that, "[s]ince a teacher's sexual molestation of a student could not possibly be deemed an acceptable practice, as some view teacher inflicted corporal punishment, a student's right to be free from such molestation may be viewed as clearly established even before *Ingraham*." *Id.* at 727. Other decisions have also recognized, in numerous contexts, the due process right to be free from wholly unjustified brutality at the hands of state actors. See, *e.g.*, *Webb* v. *McCullough*, 828 F.2d 1151, 1158 (6th Cir.

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[14] The *Doe* court relied, in particular, on *Shillingford* v. *Holmes*, 634 F.2d 263, 265 (5th Cir. 1981), in which it had held that a police officer's assault on a photographer violated the victim's due process right to free from "state-occasioned damage to a person's bodily integrity," and *Jefferson* v. *Ysleta Independent School District*, 817 F.2d 303, 305 (5th Cir. 1987) (footnote omitted), where it noted (for qualified immunity purposes) that "it is not necessary to point to a precedent which is factually on all-fours with the case at bar[;] [i]t suffices that the [defendant] be aware of general, well-developed legal principles."

1987) (disciplinary action on school field trip not justifiable as punishment); *Shillingford* v. *Holmes*, 634 F.2d 263, 265 (5th Cir. 1981) (police officer's assault on photographer); *Gregory* v. *Thompson*, 500 F.2d 59, 62 (9th Cir. 1974) (justice of the peace who assaulted and beat someone in his courtroom).[15]

There are also several reported cases under Section 242 in which the defendant was convicted of violating a due process right to bodily integrity by sexual assaulting the victim. In *United States* v. *Contreras*, 950 F.2d 232, 235-236 (5th Cir. 1991), cert. denied, 504 U.S. 941 (1992), a police officer was convicted of violating Section 242 by sexually assaulting a woman he had detained. In *United States* v. *Davila*, 704 F.2d 749 (5th Cir. 1983), border patrol officers were convicted under Section 242 for coercing sex from two women whom they had detained. And in *United States* v. *Brummett*, 786 F.2d 720 (6th Cir. 1986), the defendant pled guilty to counts under Sections 241 and 242 in connection with a sexual

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[15] See also *Dang Vang* v. *Vang Xiong X. Toyed*, 944 F.2d 476 (9th Cir. 1991) (assuming existence of clearly established fundamental right to be free from rape at hands of government official, and discussing whether rape was committed under color of law); *Gilson* v. *Cox*, 711 F. Supp. 354 (E.D. Mich. 1989); *Wedgeworth* v. *Harris*, 592 F. Supp. 155, 159-160 (W.D. Wis. 1984); *Stacey* v. *Ford*, 554 F. Supp. 8 (N.D. Ga. 1982). Cases involving corporal punishment of schoolchildren have held, under *Ingraham*, that excessive punishment would violate a student's liberty interest in personal security. See, *e.g.*, *Metzger* v. *Osbeck*, 841 F.2d 518, 520 (3d Cir. 1988); *Hall* v. *Tawney*, 621 F.2d 607, 613 (4th Cir. 1980). One appellate decision is arguably to the contrary. In *Skinner* v. *City of Miami*, 62 F.3d 344 (11th Cir. 1995), a divided court held that severe "hazing" of a firefighter by his fellow firefighters did not violate his constitutional rights.

assault. In those cases there was no dispute that the sexual assaults violated a constitutional right. Those cases surely demonstrate that, as of the date of the incidents in this case, it was already well recognized that respondent's conduct violated the Due Process Clause. Reported cases involving unjustified non-sexual assaults also demonstrate that point. See *United States* v. *Dise*, 763 F.2d at 588-589; *United States* v. *Cobb*, 905 F.2d 784, 788 (4th Cir. 1990), cert. denied, 498 U.S. 1049 (1991); *United States* v. *Tarpley*, 945 F.2d 806 (5th Cir. 1991), cert. denied, 504 U.S. 917 (1992).

A right to be free from forcible rape and other brutal assault by government officials asserting the power of their office has thus been "made specific" by decisions interpreting the Due Process Clause. Whether the proper focus of inquiry is only on this Court's decisions or on those of the lower courts as well, the overwhelming consensus of those decisions establishes that right.[16] It is not dispositive that none of the reported cases involved the precise factual situation presented here, *i.e.*, "a sitting judge, in his chambers, and in some cases, while in his judicial robes, * * * fondling and raping women with business before his court." App. 75a (Daughtrey, J., dissenting). "[L]ogical interpretations of existing law cannot be ignored simply because *factually* similar cases are not presented." *Ibid.* "It is no

[16] Indeed, Congress has enacted legislation based on the assumption that Section 242 punishes sexual assaults. In the Violent Crime Control and Law Enforcement Act of 1994, Congress required enhanced punishment for several crimes in aggravated circumstances, including sexual violence. That enhancement provision applies to violations of Section 242. See Pub. L. No. 103-322, § 320103(b)(3), 108 Stat. 2109.

extension of the criminal statute * * * to find a violation of it in a new method of interference with the right which its words protect. For it is the constitutional right, regardless of the method of interference, which is the subject of the statute and which in precise terms it protects from injury and oppression." *United States* v. *Classic*, 313 U.S. 299, 324 (1941).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General
DEVAL L. PATRICK
Assistant Attorney General
PAUL BENDER
Deputy Solicitor General
PAUL R.Q. WOLFSON
Assistant to the Solicitor General
JESSICA DUNSAY SILVER
THOMAS E. CHANDLER
Attorneys

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